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Raising Wages by Tightening the White-Collar Overtime Exemptions–The President's Initiative

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On Thursday, March 13, 2014, President Obama gave a short press conference and signed a Presidential Memorandum aimed at "updating and modernizing" overtime eligibility rules for white-collar workers. The Memorandum directs the Department of Labor to revamp its regulations to require overtime pay for more workers who currently fall under the so-called white-collar overtime exemptions of the Fair Labor Standards Act of 1938 ("FLSA"). The proposed changes, if and when they become effective, are expected to raise the salary threshold for those overtime exemptions that require a minimum salary and make the duties tests applicable to certain exemptions more difficult to satisfy. If these rule changes are implemented, they potentially will have a broad impact on employers nationwide, and could lead to overtime eligibility for workers long-classified by employers as exempt from overtime, including certain management positions (e.g., assistant manager, foreman and supervisor).

Employers should consider proactively conducting classification audits, following consultation with counsel, as the President's remarks and forthcoming regulations, along with increased budget allocations to the U.S. Department of Labor ("USDOL") for enforcement, are sure to stimulate inquiries from workers and increase governmental enforcement and private litigation.

The FLSA and the White-Collar Exemptions

The FLSA is the primary federal law governing minimum wages and overtime pay. It was intended to cover most workers and generally requires employers to pay their employees a minimum wage (currently $7.25 per hour under federal law) and to pay overtime for hours worked in excess of 40 per workweek, usually at a rate of one and one-half times the employee's "regular rate" of pay. The FLSA does, however, provide "exemptions" from overtime for certain categories of "white-collar" workers, including executive, administrative and professional employees. These employees generally must meet the minimum salary threshold of $23,660 (at least $455 guaranteed per week) and have primary job duties that include managing a part of the enterprise and/or supervising other employees, performing tasks directly related to running and/or servicing the business of the employer or the employer's customers, exercising discretion and independent judgment on significant matters, and/or performing tasks requiring advanced knowledge in a field of science or learning. Most employees earning less than $23,660 are automatically subject to FLSA minimum wage and overtime pay requirements and do not qualify for any exemption.

These white-collar exemptions have been part of the FLSA since its enactment and were revised most recently in 2004. (*See* Proskauer's client alert from April 2004.) Now, 10 years later, the President has again called on the Secretary of Labor to "modernize and streamline the existing overtime regulations" so that they are more "consistent with the intent of the Act."

The Presidential Memorandum

The President's short Memorandum provides almost no details about how he envisions the forthcoming changes, but aims primarily to address workers currently classified as exempt who earn salaries on the lower end of the minimum salary threshold and who work a great deal of overtime. According to the Obama Administration, these workers are often "low level" managers or clerical employees who work alongside hourly employees and only have marginally more responsibility than their overtime-eligible coworkers. According to the Administration, such a scenario is "unfair" and at odds with the underlying purpose of the FLSA.

It is unclear just what changes the USDOL will propose for the white-collar exemptions, but they are likely to include some combination of:

raising the minimum salary threshold for certain exemptions (some states, such as New York and California, already have higher minimum salary thresholds to qualify for certain exemptions – New York's is currently $600 per week, and California's is $640 per week, rising to $720 on July 1);

- adding or substituting a quantitative test for the current qualitative test – i.e., setting a minimum percentage of time that employees must devote to managerial or supervisorial tasks in order to be exempt; and/or
- redefining and strengthening the duties tests. While the Administration is focused on workers employed in industries such as gas stations, retail, fast food and janitorial services, its proposals are likely to impact large portions of American businesses.

Once the USDOL drafts the proposed rules, they will be published in the Federal Register and subjected to a comment period (usually three months). Thereafter, following review of the comments, the USDOL will publish "final" rules with an effective date set sometime in the future. Throughout this process, Congress may hold hearings and try to pass a series of bills or amendments to restrict the USDOL's ability to carry out the new rules, cut off funding to the USDOL, or otherwise delay implementation. Thus, it may be well over a year before any changes to the exemptions become effective.

Impact of Any Eventual Changes and Recommended Next Steps

Since 2004, employers have seen an explosion of litigation under the FLSA. The number of FLSA cases filed in federal courts has more than doubled, and the USDOL's Wage and Hour Division also has increased its compliance audits and investigations of wage complaints in recent years. The most recent fiscal budget released by President Obama also set aside an additional $41 million for the Wage and Hour Division to carry out its mission. A successful private litigant can recover: (i) payment of any back wages or overtime going back up to three years (longer under some state laws); (ii) liquidated damages of up to 100%; and (iii) reasonable attorneys' fees (which often can exceed the actual damages), and costs. There is also the potential for recovery of the value of lost benefits. In addition, willful violators may be prosecuted criminally and fined up to $10,000, and assessed civil money penalties of up to $1,100 per violation.

The President's announcement and the proposed changes will likely only trigger more activity by private litigants and federal and state agencies. Employers that have not done a classification audit in the past several years may be particularly at risk. Proskauer will continue to monitor the USDOL's progress on new regulations, but in the meantime, employers would be wise to consider the following practice pointers concerning worker classification:

i. Evaluate the classification status of workers carefully at the outset of the work relationship to determine whether a worker is exempt or overtime-eligible. If you inherit a large number of exempt employees (such as following an acquisition or a merger), perform due diligence to determine if there is potential for misclassification liability;

ii. Consider a self-audit of your exempt workforce based on the current white-collar exemption criteria to determine whether any additional employees might better be classified as overtime-eligible. Special attention should be paid to exempt employees earning at or close to the minimum salary thresholds, as well as those employed in "assistant manager," "supervisor" or "project manager"-type positions. When making this determination, understand it is often not an easy assessment, and any such audit should be undertaken with in-house or outside counsel's involvement at the outset.

Proskauer's Employment Law Counseling Practice Group has extensive experience assisting employers with employee classification and compliance audits, as well as training Human Resources Professionals in this area of the law. In addition, we can apply our experience representing employers in the defense of government investigations and private actions alleging misclassification to help ensure that problems which surface during a classification and/or payroll practices audit are resolved in a timely manner, with as little "fallout" as possible.

If you have any questions about this client alert, please contact your Proskauer relationship lawyer or any of the members of Proskauer's Employment Law Counseling and Training Group listed.

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